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Supreme Court of the United States

OCTOBER TERM—1937.

No. 349

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

against

SELLAR BULLARD, as Executor under the Last Will and Testament of CLARA R. SMITH, Deceased,
Respondent.

BRIEF OF *AMICUS CURIAE*

On question of Construction.

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New York City.

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BRIEF OF *AMICUS CURIAE*

On question of Construction.

The undersigned, being counsel for executors of a settlor of a trust which, as does this cause, involves the question herein presented, does, with the consent of counsel for the respective parties, file this brief as *amicus curiae* on behalf of such executors.

Question Presented.

The question presented is the CONSTRUCTION of Section 302, subdivision (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3rd, 1931. Specifically, the question is whether there is to be included in the gross estate of a decedent the value of property transferred by a decedent during her lifetime *which was not made*

in contemplation of or intended to take effect in possession or enjoyment at or after her death, but in which the decedent had reserved a life interest.

Facts.

This record presents the question of the taxability under the Estate Tax Law of a trust transfer made *after March 3rd, 1931* and *before June 6th, 1932*. By the Joint Resolution of March 3rd, 1931, Section 302, subdivision (c) of the Revenue Act of 1926 was amended so as to require the value of the gross estate of a decedent to be determined by including the value at the time of his death of all property wherever situated *"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth"*. The matter between the asterisks (* . . . *) was added by that Joint Resolution to the then existing law. From the time of said amendment of March 3rd, 1931, until June 6th, 1932, the law as so amended continued without change.

In February, 1932, according to the Court's finding, the decedent Clara R. Smith made a transfer in trust under which she was to receive the income during her lifetime. There is no proof or claim that the transfer was made in contemplation of death. Furthermore, the decisions of this Court definitely establish the proposition that the transfer so made was not intended to take effect in possession or enjoyment at or after the donor's death, since the interests of the beneficiaries under the transfer were acquired by

them and became effective by and at the time of the execution of the instrument (*May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782).

The record thus presents the bald question whether the trust property so transferred is to be deemed a part of the decedent's gross estate solely by reason of the fact that the decedent as donor, when she made the transfer, reserved unto herself a life interest in the income. That raises a question of the *construction* of subdivision (c) of Section 302, *supra*, which is the only question that we shall discuss.

It will be noted that we are not dealing with the question of *constitutionality* which we are informed will be discussed by others.

POINT I.

Subdivision (c), Section 302, does not apply to transfers under which the transferor has retained the income from the property for life or other period, unless it was made "in contemplation of or intended to take effect in possession or enjoyment at or after death". As the transfer in question was not made in such contemplation or to so take effect, the subdivision does not apply to the case at bar.

A. The real question involved is whether the clause following the word "including" is qualified by the preceding language of subdivision (c) or whether it provides for an entirely independent class of transfers. If it were to be read as creating an absolute independent taxable class, why use the word "*including*" immediately after the preceding class provision? Why not use the word "*or*" which would be obviously suggested? That would have been the natural and apt word to use in providing for an additional independent class.

The Court will note by reading the subdivision that the word "*or*" was repeatedly and accurately used. If provi-

sion was to be made for an independently additional class for taxation, the word "*or*" would have done so. It would have been unambiguous, natural and apt. Instead, however, of using the word "*or*", Congress took the pains to use the word "including", which obviously indicates that instead of being independent of the foregoing provision, the amplifying language was to be qualified thereby.

We are asked to believe that to express an absolute additional taxable class which could be simply done by the use of the word "or", which had been used ten times within the spacing of a few lines, Congress broke away from the use of that simple and expressive word, and instead used the expression "including", which has quite a contrary meaning. Its meaning is anything but that of betokening an absolute independent alternative. On the contrary, it has a dependent meaning. It presents something which is a part of something else—which is included in the foregoing class.

In *Montella Salt Co.* v. *Utah*, 221 U. S. 452, the Court cited the following three cases bearing upon this point with approval, namely (page 464):

> "In the case of *Barnard* v. *Darling*, 113 Massachusetts, 218, it was held that a legacy of $100 'including money trusteed at a certain bank,' could not be construed as meaning that the sum of $100 was in addition to the sum in bank.
>
> "In *Henry's Executor* v. *Henry's Executor*, 81 Kentucky, 342, a bequest of $14,000 'including certain notes,' was held to mean that the notes formed a part of the $14,000 and were not in addition thereto.
>
> "In *Neher* v. *McCook County*, 11 S. Dak. 422, it was held that a certain section of the laws of the State which provided that the sheriff's fees should be $16 for summoning a jury 'including mileage,' did not entitle him to mileage in addition to the $16."

We respectfully submit that there does not arise in this case the necessity of resorting to construction in search of

an intent since the words themselves are clear. A statute after all must be judged by its language, whatever intent Congress may have had. The only way of translating such intent into effective legislation is to pass a statute in words. If the words are unambiguous and clear, their meaning supplies the meaning of the law.

In *Smietanka* v. *First Trust and Savings Bank*, 257 U. S. 602, the Court says, page 605:

> "• • • It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication. *Treat* v. *White*, 181 U. S. 264, 267; *United States* v. *Field*, 255 U. S. 257; *Gould* v. *Gould*, 245 U. S. 151, 153."

B. On June 6th, 1932, Congress amended the subdivision in question so as to make it read as follows:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end* before his death (1) the possession or enjoyment of, or *the right to* the income from, the *property, or* (2) the *right, either alone* or *in conjunction with any person, to* designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death with-

out such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

(New matter in italics) This amendment adds to the subdivision for taxation a separate class, independent of the foregoing class, instead of one which is limited by the preceding class.

The passage of the 1932 amendment was a recognition by Congress that the previous Act did not apply to cases of transfers with a reservation of life income, unless they were included within the first clause of subdivision (c) or at least that it was doubtful whether or not the previous Act did so apply. Unless that were so, then with respect to cases like the one under review, what would have been the need of passing the 1932 amendment?

The decision in *United States* v. *Field*, 255 U. S. 257, is apt. The Court says, page 264:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (§402(e), 40 Stat. 1097): 'To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except,' etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217-218; *United States v. Bashaw*, 50 Fed. Rep. 749, 754. The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect

in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916 adopted by the Treasury Department; the same report proceeded to declare (p. 102) that 'The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax;' and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance."

Using the language of the Court just cited, we may say that it would have been easy for Congress in the Joint Resolution of 1931, to express a purpose to tax property unequivocally and absolutely in which there was a reservation of a life estate. It might very easily have done what it did in 1932, but it did not do so.

POINT II.

Bearing in mind that the established rule in the interpretation of statutes levying taxes is not to extend their provisions by implication beyond the clear import of the language used, and to resolve any reasonable doubt in favor of the taxpayer, it follows that the contention in Point I, supra, should be upheld.

In *Reinecke* vs. *Northern Trust Co.*, 278 U. S. 339, the Court says, page 348 (Italics ours):

"In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402 (c)

'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. *That doubt must be resolved in favor of the taxpayer . . . .*"

Quoted with approval—*May* v. *Heiner*, 281 U. S. 244.

In *Gould* v. *Gould*, 245 U. S. 151, the question involved was whether under the Federal income tax law taxing, among other things, gains or profits and income derived from any source whatever, included alimony. The Court held it did not, and said, page 153:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story, 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55.

"As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of 'income' causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed."

In *Treat* v. *White*, 181 U. S. 265, the Court says, page 287:

". . . It is also true, as said by this court in *United States* v. *Isham*, 17 Wall 496, 504, 'if there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollack, C. B., in *Girr* v. *Scudds*, 11 Exchequer, 191, "a tax cannot be imposed without

clear and express words for that purpose.'' ' With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. . . . ''

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HERMAN AARON,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Sellar Bullard, as Executor under the last will and testament of Clara R. Smith, deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner challenges a decision holding unconstitutional the provision of Section 302 (c) of the Revenue Act of 1926,[1] as amended by Joint Resolution of Congress of March 3, 1931,[2] which requires the inclusion in a decedent's gross taxable estate of property transferred by irrevocable deed with reservation of a life estate. On account of alleged conflict with our decisions and of the important constitutional question presented we granted the writ of certiorari.

Clara R. Smith, a resident of Illinois, died in 1933. In 1927 she transferred securities, by irrevocable deed, to her son Edward, in trust to pay the income to her for life and, upon her death, to divide the corpus into three equal parts, the income from a part to be paid to each of her three children, Lora, Bessie, and Edward, during their lives, with remainders of the daughters' shares to their respective children; upon Edward's death leaving no issue the income from his share to be paid to his widow for life and, upon her death, the remainder to be added, in equal shares, to the daughters' trust funds. Edward died in 1928 leaving a widow but no issue.

In 1931 dissatisfaction with the administration of the trust impelled the decedent to seek its abrogation. Examination of the instrument disclosed violation of the rule against perpetuities. A bill was accordingly filed in an Illinois state court to have the trust declared void. The son's widow answered denying invalidity.

[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411(c).
[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).

A guardian *ad litem* representing the interests of infant beneficiaries in remainder also opposed the prayer of the bill. Subsequently, to avoid family discord and amicably to settle the pending litigation, a compromise agreement was made by the decedent and all the adult beneficiaries consenting to the entry of a decree on condition that the decedent would declare a new trust of approximately one-third of the securities in the existing trust whereby Edward's widow should enjoy a life interest identical to that given her by the 1927 trust and, upon her death, the remainder should be equally divided between the decedent's daughters. The agreement further required the making of testamentary provision for the decedent's daughters and grandchildren, and certain outright gifts to the latter. In pursuance of the agreement, the decedent, on February 17, 1932, executed a new irrevocable deed of trust conveying approximately one-third of the corpus of the former trust and reserving to herself a life interest in the income, and executed a new will. A consent decree was then entered in the equity suit, the guardian *ad litem* representing to the court that the settlement would be advantageous to the minor beneficiaries.

The Commissioner's inclusion of the corpus of the trust of February 17, 1932, in the gross estate was sustained by the Board of Tax Appeals.[3] The Circuit Court of Appeals reversed the Board's decision.[4] We are of opinion that the action of the Commissioner and the Board should have been affirmed.

First. Both the Board and the Court held that the decree of the state court, notwithstanding its entry pursuant to stipulation, adjudicated the rights of the parties, abrogated the trust of 1927, and established the decedent's absolute ownership of the assets. This conclusion is fully supported by decisions of the Supreme Court of Illinois and we accept it. It follows that the respondent's contention that the transfer of 1932 has no independent existence and that, in legal effect, the trust for the son's widow stems from the deed of 1927, must be overruled.

Second. The trust of 1932 was created after the adoption of the Joint Resolution of March 3, 1931, which required inclusion in the gross estate of the value at the date of death of all property to the extent of any interest therein of which a decedent has at any time made a transfer by trust or otherwise under which the transferor

[3] 34 B. T. A. 243.
[4] 90 F. (2d) 144.

etained for life the possession or enjoyment of the income from the roperty, except in case of a bona fide sale for an adequate and ull consideration in money or money's worth. It is urged that the ettlement of the dispute as to the invalidity of the trust deed of 927, conditioned, as it was, upon the making of the new trust, onstitutes such a bona fide sale, for adequate consideration, as to ring the trust of 1932 within the exception. The argument is hat the decree setting aside the 1927 trust merely gave judicial anction to the compromise agreement and that the contract was or an adequate and valuable consideration and would, therefore, ave been enforced by a court of equity at the instance of any of he parties to it.

While recognizing that a decree thus begotten has the same force nd effect as a decree *in invitum*, the respondent seeks to go behind he decree and spell out a sale by Edward's widow of her interest nder the 1927 trust for the interest conferred upon her by the 932 trust. The court below has held the position untenable and e agree. The decree declared the 1927 trust void and revested he trust assets in the decedent. If that trust was, as the Illinois ourt decreed, void and ineffective because it violated the rule gainst perpetuities the son's widow took no interest under it and ave nothing to procure the 1932 transfer.

Third. The Commissioner relies not only upon the Joint Reso- ution of March 3, 1931, but upon Section 803 (a) of the Revenue ct of 1932.[5] We need not consider the latter since the Joint Reso- ution, if legally enforcible, in express terms authorized his inclu- ion of the trust fund in the decedent's gross estate. As the Reso- ution was adopted nearly a year prior to the creation of the 1932 rust no claim is or can be made that, as to that transaction, it is etroactive. The contention is that the transfer was *inter vivos*, as presently effective, was irrevocable, was not made in contem- lation of, or effective at, death, and that Congress was, therefore, ithout power to make it the subject of an estate or inheritance ax; that, while the transfer might, by appropriate legislation, have een taxed as a gift, to tax it as in the nature of a testamentary lisposition is a denial of due process. The contention is unsound or several reasons. Since Congress may lay an excise upon gifts t is of no significance that the exaction is denominated an estate ax or is found in a statute purporting to levy an estate tax. More-

[5] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

over, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation. Such a classification would not be arbitrary or unreasonable. A further vindication of the exaction is the authority of Congress to treat as testamentary transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in Nos. 375 and 484, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York:[6] "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."

We have recently sustained the prospective operation of a provision including in the gross estate property which a decedent has transferred retaining power alone, or in conjunction with any other person, to alter, amend, or revoke.[7] We held the purpose of the clause was to prevent avoidance of tax and the measure was reasonably calculated to that end. As applied to a trust created after its enactment the Joint Resolution does not violate the Fifth Amendment.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] In the Matter of Keeney, 194 N. Y. 281, 287; affirmed 222 U. S. 525.

[7] Helvering v. City Bank, 296 U. S. 85, 90. Compare Milliken v. United States, 283 U. S. 15; Tyler v. United States, 281 U. S. 497.